

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

KIM E. AYVAZIAN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947
AND
NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19980-3734

September 15, 2009

Dale Jabbar Bowen
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977
#335593 Unit SIF4

Daniel R. Losco, Esquire
Losco & Marconi, P.A.
1813 N. Franklin Street
P.O. Box 1677
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RE: Dale Jabbar Bowen v. Pamela B. Wise-Bowen
C.A. No. 4502-MA

Dear Counsel and Mr. Bowen,

Pending before me is Defendant Pamela B. Wise-Bowen's Motion for Summary Judgment, seeking to dismiss Plaintiff Dale Jabbar Bowen's action to compel a distribution from the Estate of Samuel K. Bowen pursuant to 12 Del. C. § 3101. After reviewing the pleadings and attached documents, I am submitting my draft report in which I have decided that Defendant's motion must be denied, and that a final judgment must be granted in favor of Plaintiff.

According to the pleadings, Samuel K. Bowen executed his Last Will and Testament ("Will") on January 31, 2005. In his Will, the decedent nominated Defendant as the personal representative of his estate and the trustee of the testamentary trust to be established for his three sons: Plaintiff, Richard Gary Bowen, and Samuel Kaye Bowen, Jr. Specific provisions of the

Will govern Plaintiff's share of his father's estate and testamentary trust. Article III, section 1a of the Will provides:

Inheritance for Dale Jabbar Bowen as outlined in Article III of this document shall remain in a trust account until Dale Jabbar Bowen's thirty-fifth (35) birthday. In the event of my death prior to his thirty-fifth (35) birthday, he is entitled to a lump sum payment of \$3,000.00. The remainder of his share of the estate distribution shall remain in trust and controlled by the trustee appointed through this will. The trustee for verified causes may release funds, i.e., such as school tuition, housing costs if necessary and emergencies.

Article IV, section 1 of the Will provides:

In administering the trust for my sons as provided in Article III, Section 1 and 1a, my Trustee shall maintain and distribute the Trust assets as follows:

- a. Until my sons reach the age of twenty-five (25), with the exception of Article III, Section 1a, the Trustee shall have the discretionary authority to distribute each child's share of the income and principle [sic] to or for the benefit of my children, as the Trustee determines is necessary for the support, welfare, and education of my children. The term "education" shall refer to any kind of formal education or training, including undergraduate, post-graduate, professional schooling, and vocational schooling. All undistributed income shall be periodically added to the principle [sic].
- b. In the case of my son listed in Article III, section 1a, the trustee has the discretion to withhold in partial or full the funds due to be released on his thirty-fifth (35) birthday. The reasons for withholding partial or full funds in which he is entitled [sic] should be directly related to my son's lifestyle, i.e.,; substance abuse, imprisonment, whereabouts unknown and other extenuating circumstances.
- c. The Trustee is to distribute the balance of my sons [sic] trust once they reach the age of twenty-five (25), with the exception of the directives in Article III, Section 1a and Article IV, section 1b.

On April 13, 2009, Plaintiff filed this action, seeking to compel the distribution of a lump sum payment of \$3,000 under the terms of the Will. In her Answer filed on May 13, 2009, Defendant denied that the Court has subject matter jurisdiction, and denied that she had failed to comply with the terms of the Will and Trust. In addition, Defendant alleged that Plaintiff had received more than \$3,000 from the Trust, i.e., a sum of \$2,500 that had been advanced to pay for Plaintiff's legal defense to charges that ultimately resulted in his current incarceration, and a total of \$2,082 in cash payments that had been made to Plaintiff. On June 1, 2009, Defendant

moved for summary judgment, repeating the same allegations as above, and arguing that under the Article IV, section 1(b) of the Will, she is justified in declining to make further payments to Plaintiff after his 35th birthday due to his admitted incarceration.

A motion for summary judgment will be granted where the moving party demonstrates that there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Haas v. Indian River Volunteer Fire Co., Inc.*, 2000 WL 1336730 (Del. Ch. Aug. 14, 2000), *aff'd*, 2001 WL 263137 (Del. Mar. 12, 2001); Ch. Ct. R. 56. In this case, no material facts are in dispute. And there is no question that this Court has jurisdiction over the distribution of assets of the estates of decedents. *In re Estate of Massello*, 1997 WL 89091, *2 (Del. Ch. Feb. 24, 1997); 12 Del. C. § 2331. Although 12 Del. C. § 3101 creates a legal remedy against an administrator for a distributive share that is due, that provision is merely a concurrent remedy to the traditional proceeding in equity. *Massello*, mem. op. at * 2, *supra*, citing *Walker v. Caldwell*, 67 A. 1085 (Del. Ch. 1896).

It is undisputed that Plaintiff had not reached his 35th birthday by the time of his father's death on October 18, 2005. Article III of the Will provides that a certain portion of the decedent's residuary estate is to be distributed to Defendant in a lump sum, and the remainder of the residuary estate is to be held in trust for decedent's three sons in equal shares. The plain language of Article III, section 1(a) states that Plaintiff "***is entitled to a lump sum payment of \$3,000***" in the event that Plaintiff has not reached his 35th birthday before his father's death. It is undisputed that the above contingency was met in this case. The language of Article III, section 1(a) is specific and mandatory. Once the lump sum payment of \$3000 is made to Plaintiff, then the trustee has discretion over Plaintiff's remaining share of the funds held in the testamentary trust. She can withhold in part or in full Plaintiff's remaining share of the trust funds if she

believes it is in his best interest due to his “lifestyle.” The incremental payments Defendant previously made to or on behalf of Plaintiff, however, did not relieve Defendant of her fiduciary duty as personal representative of the decedent’s estate and trustee of the testamentary trust to abide by the terms of the decedent’s Will and to distribute a lump sum payment of \$3,000 to Plaintiff.

Since Defendant is not entitled to judgment as a matter of law, Defendant’s motion for summary judgment is accordingly denied. On the other hand, since Plaintiff is clearly entitled to the relief he seeks, i.e., the distribution of a lump sum payment of \$3,000, I am *sua sponte* granting summary judgment against Defendant as the moving party. *See Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992), citing *Bank of Delaware v. Claymont Fire Company No. 1*, 528 A. 2d 1196, 1199 (Del. 1987). When this draft report becomes final, counsel for Defendant shall submit to the Court a form of order to that effect.

Very truly yours,

/s/ Kim E. Ayvazian

Kim E. Ayvazian
Master in Chancery

KEA/lkpr
cc: Register in Chancery